conduit investment of about $903 million,[37] produces a net investment per duct-foot of about $3.40.

CTTANY, however, regarded Verizon's duct-to-conduit ratio of 3.8, based on ARMIS data, as out of line with the ARMIS-based duct-to-conduit average ratio of 5.74 in the remainder of the former Bell Atlantic footprint. It therefore turned to Verizon's continuing property records, a detailed physical inventory system that it regarded as likely to be more accurate than ARMIS, noting that the FCC approach generally relied on publicly available reports such as ARMIS but permitted use of more accurate data when available. Verizon's CPR data showed the average number of ducts per main conduit to be 7.91. CTTANY's witness Kravtin reduced that figure to 7.21 ducts per conduit to reflect the lower number of ducts to be found in subsidiary conduit. The adjustment was based on Verizon's evidence that there were two ducts in subsidiary conduit, a figure that witness Kravtin then weighted on the basis of the ratio of main to subsidiary duct derived from Verizon's CPR.[38]

Verizon objects both to CTTANY's reference to the CPR data and to the manner in which it used those data. It notes that the CPR data as used by CTTANY produce a duct-foot to trench-foot ratio that is about as far above the Bell Atlantic footprint average as the ratio based on ARMIS data is below it; that a lower average level of ducts per trench in New York than in other parts of the footprint may be attributable to local conditions, such as the considerable amount of relatively small cross-section conduit systems in suburban areas[39]; and that, in any event, there is no discrepancy between the CPR data and the ARMIS data if the CPR data are correctly used to simply determine the total duct-footage over which the investment should be spread.

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[37] Gross investment of $1.336 billion, reduced for depreciation and deferred taxes. (Verizon's Reply Brief, p. 116.)

[38] CTTANY's Initial Brief, pp. 21-24 and record citations there referenced.

[39] Verizon's reply to CTTANY's motion to strike, p. 5, n. 11.

The discrepancy arises, Verizon continues, because of what it sees as CTTANY's misapplication of the CPR data to produce a weighted average of 7.21 duct-feet to conduit-feet. That figure, it maintains, is based on weighting the number of duct-feet of main and of subsidiary conduit, which overstates the effect of the mainline conduit, which has a substantially greater number of ducts per conduit. That calculation thereby increases the weighted average and reduces the investment per duct-foot. Verizon suggests that the correct way to compute the weighted average would be to do so on the basis of the number of mainline and subsidiary trench-feet, a calculation that would produce a result equal to the result produced by simply dividing net investment by total duct-feet.[40] In its reply to CTTANY's motion to strike, Verizon presents a numerical example showing that CTTANY's weighting method produces a cost per duct-foot that, when multiplied by the total number of duct-feet, yields a cost figure well below the figure initially posited.[41]

Verizon objects further that trenching entails substantial fixed costs that do not vary with the number of ducts and that subsidiary conduit systems with smaller number of ducts per trench therefore have a significantly higher cost per duct than mainline systems. The average cost per duct therefore is understated by CTTANY's understatement of the contribution made by subsidiary ducts.[42]

In response, CTTANY maintains that Verizon has failed to explain the discrepancy between its New York duct-to-conduit

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[40] It is this calculation, set forth in alegebraic terms at p. 119, n. 309 of Verizon's reply brief, that is central to CTTANY's motion to strike. As noted above, I am denying the motion to strike and entertaining both CTTANY's further reply appended to its motion and Verizon's surreply incorporated in its response to the motion. Verizon's reply brief was in no way improper, but each of the ensuing pleadings further clarifies the issue.

[41] Verizon's response to CTTANY's motion, p. 7, n. 14.

[42] Verizon's Reply Brief, p. 120.

ratio and those in other parts of its footprint. It disputes Verizon's charge that it has overstated the contribution of mainline conduit, noting that its ratio of main to subsidiary conduit is derived from Verizon's own CPR data and that Verizon has not offered an alternative weighting. It suggests that Verizon is abandoning the ratio in its CPR "because of the results produced by its application in the FCC formula,"[43] and it notes that its members rent almost exclusively mainline conduit and that the rate would have been even less than its witness calculated had the number of ducts per mainline conduit been used.

Verizon's challenge to CTTANY's adjustment is persuasive. In effect, CTTANY is double-counting the greater number of ducts in main conduit: once to determine the weighting to be afforded main conduit and once to determine the number of ducts to which the weighting is to be applied. The proper weighting would be on the basis of main and subsidiary trench- feet, and that weighting would then be applied to the larger number of ducts in main conduit, thereby recognizing that larger number only once. As Verizon has shown, that correct weighting produces, as would be expected, a cost per duct-foot identical to the one produced by simply dividing net investment by the number of duct-feet. Accordingly, I recommend that the rate be set on the basis of the FCC method, using a cost per duct-foot calculated by dividing net investment by the number of duct-feet shown in the ARMIS data, and without reference to the CPR data.

Half-Duct Presumption

To facilitate calculation of a rate reflecting the percentage of conduit capacity occupied by an attachment, the FCC adopted in the Fee Order and the Telecom Order, and reaffirmed in the Reconsideration Order, a rebuttable presumption that the

[43] CTTANY's supplement to its reply brief, as attached to its motion to strike, unnumbered second page.

attacher occupies one half of a duct.[44] In other words, unless the presumption is rebutted, the attacher is charged a rate based on one-half of the calculated cost per duct-foot. The FCC added that "when the actual percentage of capacity occupied is known, it can and should be used instead of the one half duct presumption," and that "the presence of inner duct is adequate rebuttal. Where inner duct is installed, either by the attacher or in a previous installation, the maximum rate will be reduced in proportion to the fraction of the duct occupied. That fraction will be one divided by the actual number of inner ducts in the duct."[45]

In light of those provisions, CTTANY presented rates for a full duct, a half duct, one-third of a duct, and one-quarter of a duct, to be applied depending on the number of inner ducts installed. Verizon objected, contending that the half-duct premise should be applied inasmuch as "Verizon would not, except in extraordinary circumstances, occupy the same duct as a CLEC."[46] In its own study, Verizon calculated rates for a whole duct and a half duct only. CTTANY contends, however, that where inner duct is used, the attacher typically occupies less than half of the duct and that the FCC's process for rebutting the half-duct presumption recognizes that reality.

Although Verizon contends that CTTANY ignores Verizon's testimony that it would not typically occupy the same duct as a CLEC, that testimony does not really undermine the basis for the FCC's conclusion that the presence of inner ducts rebuts the half-duct presumption. Verizon's witness went on to acknowledge on cross-examination that it retains custody of the inner ducts not used by the attacher along with the option to lease that capacity out to another attacher.[47] There is, accordingly, no reason to question the FCC's premise that the

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[44] Reconsideration Order, ¶¶95-98 and history there cited.

[45] Reconsideration Order, ¶98.

[46] Verizon's Reply Brief, p. 120, citing Tr. 5,756-5,757.

[47] Tr. 5,757.

presence of inner duct rebuts the presumption and warrants assigning the attacher a correspondingly lower proportion of the total cost. I recommend, accordingly, adoption of CTTANY's proposal to set the rate on the basis of the number of inner ducts present.

ACCESS TO RIGHTS-OF-WAY

Verizon proposed to continue charging on an individual case basis (ICB) for access to private rights-of-way that it owns or controls. In effect, it would flow through, on a prorated basis, the fee that it itself pays; that fee will vary widely, given the diverse nature of the real property interests involved.

CTTANY notes that most right-of-way expenses are incorporated into the conduit rent itself, and it infers from cross-examination of Verizon's witness Brant that Verizon "only intends to use ICB pricing in the most unusual circumstances where Verizon is not in the public right of way but instead is on private property and the costs have not been internalized into the conduit rental."[48] It asks the Commission to clarify that this is the case and to express its willingness to entertain complaints about such pricing if the parties cannot reach agreement.

Verizon responds that its ICB proposal does not apply at all to rights-of-way associated with conduit rental but only to "'naked' rights-of-way, i.e., to rights-of-way that a CLEC seeks to 'sublet' from Verizon for the deployment of its own conduit. . . . It would not apply to the rates for facilities such as loop or conduit that already incorporate relevant right of way costs through the application of [annual cost factors]."[49] Verizon adds that there is no distinction to be drawn in this regard between public and private rights-of-way.

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[48] CTTANY's Initial Brief, p. 44.

[49] Verizon's Reply Brief, p. 127 (emphasis in original).

Verizon's clarification of its proposal is adequate; naked rights-of-way, whether public or private, should continue to be priced on an individual case basis.

CONDUIT OWNED BY EMPIRE CITY SUBWAY

As noted at the outset, conduit in Manhattan and the Bronx is owned by Verizon's wholly owned subsidiary, Empire City Subway, an entity regulated by the New York City Department of Information Technology and Telecommunications rather than by the Commission. CTTANY asks the Commission to assume jurisdiction over these rates or to declare that the FCC has plenary jurisdiction over them inasmuch as the City of New York has not certified to the FCC that it has assumed jurisdiction.

CTTANY argues that Verizon owns and controls Empire City Subway. It is irrelevant, in its view, that title to the conduit resides in the subsidiary, inasmuch as an ILEC's obligations with regard to conduit access depend on control rather than on ownership. CTTANY contends as well that as part of its §271 application, Verizon acknowledged that Empire City Subway is governed by the 1996 Act and its market opening obligations and asserts "it would be intolerable to allow Verizon into the long-distance business based on an unbundling representation that it is now breaking."[50]

CTTANY further alleges that Verizon's practices with respect to Empire City Subway rates charged to itself violate the FCC's affiliate transaction rules and that Verizon pays Empire City Subway a rental far less than what it proposes to charge third parties. Acknowledging the 1982 court decision holding that the Commission did not have jurisdiction over Empire City Subway,[51] CTTANY suggests that such "accidental advantages of incumbency" were supposed to be overturned by the

[50] CTTANY's Initial Brief, p. 47.

[51] New York State Cable Television Association v. PSC, 87 A.D. 2nd 288 (3rd Dep't, 1982).

1996 Act. It asserts Verizon is attempting to exempt Empire City Subway form the jurisdiction of the FCC and this Commission on the basis of "the fiction that the companies are separate entities."[52]

In response, Verizon notes the Commission's past disclaimer of jurisdiction over Empire City Subway's rates and the Third Department's holding to the same effect. It suggests that "CTTANY's efforts to persuade the Commission to assume jurisdiction notwithstanding the court's ruling (and its own prior determination) are, quite simply, an invitation to lawlessness" and should be disregarded.[53] Verizon adds that CTTANY's charge with respect to the FCC's affiliate transaction rules is beyond the Commission's jurisdiction and, in any event, is unfounded inasmuch as the transactions may be accounted for at tariffed rates, and Empire City Subway's rates are tariffed with New York City. Similarly, it contends, the FCC's authority over Empire City Subway's rates is beyond this Commission's jurisdiction.

Verizon's arguments on this point are well taken. CTTANY's proposal would have the Commission disregard its own long-standing precedent as well as the determination of the courts and should not be further considered.

SUMMARY OF RECOMMENDATIONS

Rates for ducts and conduits should be set on the basis of the FCC's method without the adjustment proposed by CTTANY. Those rates are calculated in the Appendix.

Rights-of-way should continue to be priced on an individual case basis.

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[52] CTTANY's Initial Brief, p. 48.

[53] Verizon's Reply Brief, p. 128.

The Commission should continue to recognize that the rates of Empire City Subway Limited are not within its jurisdiction.

JAL:gds
June 18, 2001

Verizon New York Inc.
Derivation of Recommended Duct and Conduit Rates per RD

Line #	Item	Source	Amount
1	Gross Conduit Investment	1999 ARMIS	$1,335,713,000
2	Accumulated Depreciation for Conduit	1999 ARMIS	401,098,000
3	Accumulated Deferred Income Taxes for Conduit	1999 ARMIS	31,534,212
4	Net Conduit Investment	(L1-L2-L3)	903,080,788
5	System Duct Length (Feet)	1999 ARMIS	265,472,494
6	Net Conduit Investment per Duct Foot	L4/L5	3.40
7	Carrying Charge Factor	1999 ARMIS	43.97%
8	Maximum Rate Per Full Duct Foot	L6*L7	$1.50
9	Rate Per Half Duct	L8/2	$0.75
10	Rate Per Third Duct	L8/3	$0.50
11	Rate Per Quarter Duct	L8/4	$0.37

Attachment 3

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on January 23, 2002

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 98-C-1357 - Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements.

ORDER ON UNBUNDLED NETWORK ELEMENT RATES

(Issued and Effective January 28, 2002)

BY THE COMMISSION:

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INTRODUCTION AND PROCEDURAL HISTORY

In September 1998, we announced our intention to undertake, beginning in January 1999, a comprehensive reexamination of the unbundled network element (UNE) rates of Verizon New York Inc. f/k/a Bell Atlantic-New York,[1] as set in the First Network Elements Proceeding. (That case is referred to as "the First Elements Proceeding" or, simply, "the First Proceeding.")[2] This ensuing case has had a long and complex procedural history, including various interim measures and extensions of deadlines in response to pertinent federal court decisions and a delay of several months in the aftermath of the September 11 attack on New York and of settlement efforts described below. Only the broad outlines of that history will be recounted here.

On the basis of an initial collaborative process facilitated by Department of Public Service Staff, the proceeding was divided into three modules: Directory Database (DDB); Collocation; and Unbundled Network Elements (UNEs) generally.[3] The first two modules culminated in decisions issued

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[1] Cases 95-C-0657 et al., First Network Elements Proceeding, Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding (issued September 30, 1998). Except where clarity otherwise requires, Verizon is referred to as such throughout this order, even in references to matters that predate the name.

[2] The First Elements Proceeding comprised four phases, designated "Resale" and Phases 1, 2, and 3, as follows. Resale: Opinion No. 96-30 (issued November 27, 1996). Phase 1 (network elements generally): Opinion No. 97-2 (issued April 1, 1997); rehearing, Opinion No. 97-14 (issued September 22, 1997). Phase 2 (primarily Operations Support Systems and Nonrecurring Charges): Opinion No. 97-19 (issued December 22, 1997); rehearing, Opinion No. 98-13 (issued June 8, 1998). Phase 3 (various issues, including collocation): Opinion No. 99-4 (issued February 22, 1999); rehearing, Opinion No. 99-9 (issued July 26, 1999). The phases and their opinions are referred to as "Phase 1," "Phase 2 Rehearing Opinion," etc., without further specification.

[3] Case 98-C-1357, Ruling on Scope and Schedule (issued June 10, 1999).

during the first half of last year.[4] During the course of the proceeding, special expedited tracks were established for consideration of certain digital subscriber line (DSL) rates and line sharing rates; those, too, have been concluded.[5] In several instances, issues raised in those earlier modules and tracks gave rise to matters considered further here.

Initial testimony in Module 3 was originally scheduled to be filed in December 1999, with hearings to begin in February 2000. For a variety of reasons, including the broad scope of the proceeding, the need to take account of actions by the FCC and of a federal court decision, and the strike by Verizon employees during August 2000, that schedule was extended on several occasions, and hearings were ultimately held in December 2000. The only one of these factors that warrants specific note here is the decision of the United States Court of Appeals for the Eighth Circuit to vacate 47 C.F.R. §51.505(b)(1), a portion of the FCC's rules central to the requirement that UNEs be costed and priced on the basis of Total Element Long-Run Incremental Cost (TELRIC).[6] (That decision is now stayed pending Supreme Court review; these matters are discussed further in the next section.)

In view of the Eighth Circuit's ruling and the uncertainty it was said to create with regard to the proper costing standard, Verizon urged suspension of the proceeding. All other parties opposed any suspension; they questioned, among

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[4] Module 1 (DDB): Case 98-C-1357, Opinion No. 00-2 (issued February 8, 2000); Order on Petitions for Rehearing (issued June 29, 2000). Module 2 (Collocation): Case 98-C-1357, Opinion No. 00-8 (issued June 1, 2000); Order Denying Petitions for Rehearing of Opinion No. 00-08 (issued January 4, 2001).

[5] DSL: Case 98-C-1357, Opinion No. 99-12 (issued December 17, 1999); Order Denying Petitions for Rehearing (March 17, 2000). Line Sharing: Case 98-C-1357, Opinion No. 00-7 (issued May 26, 2000); Order Denying Petition for Rehearing (issued October 3, 2000).

[6] Iowa Utilities Bd. et al. v. FCC, 219 F.3d 744(8th Cir. 2000).

other things, the import of the court's decision in jurisdictions beyond the Eighth Circuit and argued (contrary to Verizon's view) that Verizon in any event remained bound to TELRIC pricing by conditions imposed by the FCC in approving the merger of its predecessor companies.[7] Administrative Law Judge Joel A. Linsider declined to suspend the proceeding, citing "(1) the time it likely will take for [the] uncertainties to be resolved, (2) the effect of the FCC's merger conditions[8] during that interval, and (3) the Eighth Circuit's sustaining of forward-looking pricing [as a matter of principle, despite its rejection of the specific version of forward-looking pricing embodied in the rule it had vacated]."[9]

Verizon sought reconsideration of that ruling, in part on the grounds that the FCC had recently construed its earlier order approving the NYNEX/Bell Atlantic merger in a manner assertedly suggesting that the Bell Atlantic/GTE Order likewise did not require TELRIC pricing as a merger condition.[10] The Judge declined to reconsider, noting the significant difference in wording between the two merger orders and seeing no need to change his conclusion that "what the [Bell Atlantic/GTE] order means may ultimately be a matter for the FCC and the courts to decide, but for present purposes [it] provides an adequate basis for concluding that Verizon remains obligated, notwithstanding

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[7] CC Docket No. 98-184, GTE Corporation and Bell Atlantic Corporation, Memorandum Opinion and Order (rel. June 16, 2000), FCC 00-221 (GTE/BA Order).

[8] This referred to conditions imposed by the FCC on the earlier NYNEX/Bell Atlantic merger as well as the Bell Atlantic/GTE merger just noted.

[9] Case 98-C-1357, Ruling on Module 3 Schedule (issued August 24, 2000), p. 7.

[10] Verizon cited the FCC's dismissal of complaints that Verizon had violated such a commitment made in connection with the NYNEX/Bell Atlantic merger. File No. E-98-05, AT&T Corporation v. Bell Atlantic Corporation, and File No. E-98-12, MCI Telecommunications Corporation et al. v. Bell Atlantic Corporation, Memorandum Opinion and Order (rel. August 18, 2000).

the Eighth Circuit's decision, to continue pricing UNEs on a TELRIC basis and will remain so obligated at least until the Eighth Circuit's decision is sustained or becomes non-appealable."[11] The proceeding went forward on that basis.

Initial testimony was filed (on February 7, 2000 and, with respect to some issues, on February 22, 2000[12]) by Verizon, jointly by AT&T and WorldCom, Inc., jointly by Covad Communications Company and Rhythms Links Inc., and by FairPoint Communications Corp. Responsive testimony, due June 26, 2000, was filed by Verizon, AT&T (alone), WorldCom (alone), AT&T/WorldCom (jointly), Rhythms/Covad (jointly), the CLEC Coalition,[13] the CLEC Alliance,[14] Z-Tel Communications, Inc., Cablevision Lightpath, Inc., the Cable Television and Telecommunications Association of New York, Inc. (CTTANY), and the United States Department of Defense and all Federal Executive Agencies (Federal Agencies). Rebuttal testimony, due October 19, 2000, was filed by Verizon, AT&T/WorldCom, Rhythms/Covad, the CLEC Coalition, FairPoint, and DOD/FEA. In addition to these principal filings, supplemental or supplemental responsive or rebuttal testimony on particular

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[11] Case 98-C-1357, Ruling Denying Request for Reconsideration (issued September 18, 2000), p. 4. The FCC staff has since stated its view that the merger condition has this effect. Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, to Michael Glover, Verizon Communications, Inc. (September 22, 2000).

[12] Portions of the February 22 testimony were admitted as part of the line sharing track previously referred to.

[13] The CLEC Coalition comprises Allegiance Telecom of New York, Inc.; Intermedia Communications Inc; and XO New York, Inc., f/k/a NEXTLINK New York, Inc. Allegiance did not participate in the Coalition's brief on exceptions, but the brief notes that Allegiance's decision not to participate should not be construed as disagreement with the Coalition's exceptions.

[14] At the time testimony and briefs to the Judge were filed, the CLEC Alliance comprised CoreComm New York, Inc.; CTSI, Inc.; Mpower Communications, Inc.; Network Plus, Inc.; RCN Telecom Services, Inc.; and Vitts Networks, Inc. The Alliance filed no brief on exceptions, but its reply brief on exceptions identifies its members as RCN and Focal Communications, Inc.

issues was submitted by Verizon (May 23, September 11, September 25, November 8, November 22, and December 5), Rhythms/Covad (November 13), and CTTANY (November 29).

An attorneys' prehearing conference was held in New York City on November 30, 2000 for the purpose of introducing pre-filed testimony into the record via affidavit, subject to later cross-examination of witnesses as to whom cross had not been waived. Hearings were held before Judge Linsider in Albany on December 7, 8, 12, 13, 15, 19, and 20, and an on-the-record post-hearing attorneys' teleconference was held on December 21. Following the hearings, Staff of the Department of Public Service posed a series of questions to Verizon and AT&T; their responses have been admitted as exhibits 457 and 458 respectively.

The record comprises 4,954 pages of stenographic transcript (numbered 1,150-6,103) and 159 exhibits (numbered 301-459). The following pages of the transcript have been provisionally designated as proprietary: 1620-1877 (public version at 1362-1617), 2067-2216 (public version at 1917-2065), 3110-3189 (public version at 2832-2911), 3813-3958 (public version at 3666-3811), 3984-4008 (public version at 4009-4032) 4059-4135 (public version at 4137-4204A), 4255-4302 (public version at 4206-4253), 4432-4453 (public version at 4456-4476), 4558-4576 (public version at 4541-4557), 5674-5746 (public version at 5599-5672), 4911, 5453-5456. Provisionally proprietary exhibits are 317P, 320P, 324P, 326P, 328P, 330P, 333P, 339P, 358P, 367P, 370P, 375P, 381P-389P, 392P, 411P, 412P, 414P, 417P, 418P, 448P, 453P, and 455P. Judge Linsider's ruling on the final status of the provisionally protected material is pending.

Initial briefs, due February 16, 2001, were filed by Verizon, AT&T, CTTANY, Lightpath, the CLEC Alliance, the CLEC Coalition, the Federal Agencies, FairPoint, Rhythms/Covad, and Z-Tel. Reply briefs, due March 14, 2001, were filed by those parties except for Z-Tel.

In a recommended decision issued May 16, 2001, Judge Linsider treated all issues in the case other than duct and

conduit rentals; the latter were the subject of a supplemental recommended decision issued June 18, 2001. (The two documents are referred to in this order as the "recommended decision" and the "supplemental recommended decision.")

Briefs on exceptions to the recommended decision have been submitted by Verizon, AT&T, WorldCom, Rhythms/Covad, the CLEC Coalition, FairPoint, Z-Tel, Focal Communications, Inc., Metropolitan Telecommunications (MetTel), Broadview Networks, Inc., and the New York State Attorney General.[15] Reply briefs on exceptions have been submitted by those parties except for Focal, FairPoint, and Broadview, and by the CLEC Alliance.[16] On July 18, 2001, Verizon moved to strike, as improper response, certain portions of the reply briefs on exceptions of Z-Tel and AT&T and to submit further argument on certain points made by those parties and by WorldCom; AT&T, WorldCom, and Z-Tel replied to the motion. We consider it in connection with the specific issues to which it pertains.

Briefs and reply briefs on exceptions to the supplemental recommended decision have been submitted by Verizon and CTTANY. RCN Telecom Services, Inc. (RCN) has submitted a late reply brief on exceptions with a request for leave to file it; that request is granted.

Following the September 11 attack, we invited comment from the parties on its implications, if any, for this proceeding. In general, Verizon cited a variety of factors that, in its view, made the existing record outdated and required further consideration; the CLEC parties saw no implications for the proceeding whatsoever and urged prompt decision on the basis of the existing record. Later, Department of Public Service Staff, as a party to our proceeding examining

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[15] Several of these parties had not previously participated actively in the proceeding. Consistent with 16 NYCRR 4.3 (c)(2), the Judge authorized their late intervention on the condition that they be bound by the record developed to that point.

[16] As noted, the CLEC Alliance now comprises RCN and Focal.

future regulatory arrangements for Verizon,[17] filed a motion in that proceeding and this, urging us to hold the decision in this proceeding in abeyance and to consider UNE rates in the Incentive Plan proceeding, where they might become part of an overall, integrated negotiated outcome. We granted Staff's motion on November 30, 2001,[18] imposing a 60-day limit on the negotiation effort, directing the parties and the settlement judge to report within 30 days on their progress, and noting that we would then consider alternatives in the event the negotiations were not proving productive.

It is now some 60 days since negotiations began, and no agreement incorporating UNE rates has been reached. Nor do we see any need to delay decision with respect to UNEs for the reasons urged by Verizon in its comments on the implications of the September attack. That event, though vast in its overall impact, has at most a marginal effect on the TELRIC analysis of forward-looking costs being conducted here. Verizon argues that the disaster shows a need for greater infrastructure redundancy, to be achieved either through modification of its own network or through partial duplication of that network by facilities-based competitors (concerns echoed in comments filed by Lightpath); but those considerations, even if sound, are too inchoate to be taken into account here. Even if the September 11 attack turns out to warrant changes in network design, that process will take time, and its results cannot be anticipated. The associated uncertainty does not warrant delaying the decision in this case; for we live in a world of constant change, where decisions must be made on the basis of the best information available at a given time. Later events (relating to network design, the legal status of TELRIC, or a host of other matters) may warrant revisiting those decisions, but if they are deferred pending the pursuit of an elusive certainty, they will never be made. And

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[17] Case 01-C-1945, Verizon New York Inc. - Cost Recovery and Future Regulatory Framework, also known as the Verizon Incentive Plan proceeding.

[18] Cases 01-C-1945 and 98-C-1357, Order Granting Staff Motion (issued November 30, 2001).

while Verizon properly cites the benefits of facilities-based competition, we have long recognized those benefits; and the UNE rates we are adopting here should not impede its development. Meanwhile, we have a responsibility under the 1996 Act to set proper UNE rates and avoid allowing unwarrantedly high UNE rates to impede the development of competition, and we accordingly proceed to set those rates on the basis of the extensive record here before us.

LEGAL CONTEXT; THE STATUS OF TELRIC

This case, like the First Elements Proceeding, has been litigated on the basis of the Federal Communications Commission's total element long-run incremental cost (TELRIC) standard despite the legal cloud cast over the standard by a federal court decision. Because of the importance of the standard, we begin with a review of its background, nature, and current status.

Under §252(d)(1) of the Telecommunications Act of 1996 (the 1996 Act),

> Determinations by a State commission of the just and reasonable rate ... for network elements ...--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the ... network element... and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.